(6)

No. 83-2161

IN THE

Supreme Court of the United States

October Term, 1983

STATE OF MONTANA, *et al.*,
Petitioners,
v.
BLACKFEET TRIBE OF INDIANS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF NEW MEXICO, ARIZONA, ALASKA, CALIFORNIA, IDAHO, UTAH AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE STATE OF MONTANA

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QUESTION PRESENTED

May states impose their severance taxes on royalty payments to tribes from non-Indian severing activities which take place on reservation land pursuant to the taxing provisions in 25 U.S.C. § 398 and 25 U.S.C. § 398c which specifically allow states to impose their taxes on such royalties?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

STATUTES:

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INTEREST OF AMICI CURIAE STATES

The states filing this brief as amici curiae on behalf of the State of Montana have a strong interest in the outcome of this case. All are states with mineral wealth whose fiscal integrity will be affected by this Court's determination of whether the states may tax royalty payments to tribes from non-Indian severance on reservation land. New Mexico, Arizona, and Utah, for example, are important producers of various minerals

including crude oil, gas, coal and uranium. More uranium is mined in New Mexico and the state has greater uranium reserves than any other state. In the production of gas, New Mexico ranks fourth in the nation, and in the production of crude oil, seventh. It is estimated that New Mexico contains 2.4 billion tons of strippable coal reserves,[1] while Arizona contains approximately one billion tons of strippable coal reserves.[2]

Taxes on mining and oil and gas extraction are important sources of revenue for the amici states, some of which have relatively small populations for their large areas.[3] The low population density increases the cost of providing adequate state services, while the relative lack of industrialization in these states minimizes the tax base.

Increased development of energy resources will inevitably impose significant costs on the states. Large scale development of these resources will necessitate direct expenditure of funds by the states to regulate, monitor and control pollution. Energy development in rural areas necessitates expenditures of state funds for road construction and maintenance. Moreover, the influx of new workers in rural areas causes dramatic impacts on state expenditures,[4] since new communities equipped with

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1 Bureau of Geology in the Mining and Minerals Division of the New Mexico Energy and Minerals Department, New Mexico's Energy Resources '81, at 8, Table 1 (1981).

2 Arizona Bureau of Mines, Bulletin 182, Table II, p. 27 (1970).

3 For example, the populations of New Mexico and Arizona are 1,299,968, and 2,717,866, respectively, while New Mexico contains 121,412 square miles and Arizona's area in square miles is 113,417, according to the Council of State Governments, *The Book of the States* 1982-83, at 714 and 700 (1982).

4 Western Governors' Regional Energy Policy Office, Financial Strategies for Alleviation of Socioeconomic Impacts in Seven Western States, at 2 (1977).

schools, utilities, fire and police protection, and recreation and health facilities must be built.

A significant amount of the energy production in several of the amici states occurs and will continue to occur on Indian lands. Indian lands comprise large percentages of the states' total acreage. For example, in New Mexico, Indian lands account for approximately twenty percent of the state's total area, while in Arizona the total is almost twenty-seven percent. Portions of the Navajo and Ute Reservations are located within Utah. Forty-four percent of the uranium produced in New Mexico in 1979 came from Indian lands,[5] and forty-two percent of all coal mined the same year came from Indian lands.[6] Many of the mineral reserves in New Mexico are also on Indian lands: sixty-two percent of the strippable coal reserves are on Indian land, as are between twenty-five and fifty-five percent of New Mexico's most certain uranium reserves.[7] Likewise, approximately seventy-five percent of all uranium in Arizona is on the Navajo Indian Reservation.[8] A full one hundred percent of the coal mined and oil extracted in Arizona is from Indian land; all

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5 This figure is calculated by comparing tons of uranium ore produced on Indian lands in New Mexico in 1979 (*see* Geological Survey, Conservation Division, United States Department of the Interior publication, Federal and Indian Lands: Coal, Phosphate, Potash, Sodium, and Other Mineral Production, Royalty Income, and Related Statistics, at 177 (June 1980)) with the tons of uranium ore produced in New Mexico in 1979 (*see* Bureau of Geology in the Mining and Minerals Division of the New Mexico Energy and Minerals Department, New Mexico's Energy Resources '80, at 35, Table 27 (1981)).

6 New Mexico's Energy Resources '80, at 30, Table 21.

7 New Mexico's Energy Resources '80, at 30, Table 21 and calculations at 26 from Table 12.

8 Arizona Department of Energy, Open File Report, Radioactive Occurrences and Uranium Production in Arizona (1981).

of the reserves of those minerals are located on Indian reservation lands.[9] Clearly, if these and other states lose their ability to tax mineral production by non-Indian lessees on Indian lands, they will lose substantial revenues, thereby decreasing their ability to effectively serve their citizens[10] and to contribute to energy development.

The current case is additionally important to the amici states because its resolution may affect the outcome of numerous cases pending before various courts in each of these states which challenge the states' ability to tax oil and gas production and coal, uranium and other mineral severance from various Indian lands. Because of the importance of the issues raised, the amici states hereby submit this brief in support of the validity of the taxing authorizations contained in the 1924 and 1927 Acts.

SUMMARY OF ARGUMENT

In 1924 and again in 1927, Congress, after lengthy discussion and study, specifically provided that production of oil, gas and other minerals from Indian reservation land could be taxed by the state in which the land was located in all respects the same as production from non-reservation land. Montana and the amici states have imposed severance taxes on Indian royalties and on non-Indian production from reservation land since that time. The Department of the Interior interpreted the 1924 and 1927 Acts as permitting state taxation and actively assisted in the collection of the state taxes until 1977. This long-standing and contemporaneous administrative determination by the Department of Interior that the 1924 and 1927 Acts authorize state taxation and are unaffected by the general 1938 Mineral Leasing Act supports the states' authority to tax and should be given deference. The Mineral Leasing Act of 1938 which set forth standard procedures for the leasing of Indian lands did not address the issue of state taxation and the legislative history evidences no intention on the part of Congress to repeal its earlier express authorization of state taxation. The 1924 and 1927 taxing authorizations continue to be in effect because they have not been expressly or impliedly repealed by the Mineral Leasing Act and thus Montana's taxes and those of the amici states are specifically authorized by law.

The court below held that the Indian Reorganization Act created an ambiguity in the unambiguous provisions of the 1924 and 1927 Acts authorizing the states' taxes. Once having found this ambiguity, the Ninth Circuit then employed the canon of construction requiring that ambiguous statutes be interpreted in favor of Indians to conclude that the lack of express incorporation of the taxing authorization in the 1938 Mineral Leasing Act effected a partial implied repeal of the taxing authorization. There is no authority for applying this rule of statutory construction in interpreting the Indian Reorganization Act because the Indian Reorganization Act creates no ambiguity in the otherwise clear statutory authorization of the states' taxes. Thus there is no need to employ any canons of construction because the 1924 and 1927 Acts and the Indian Reorganization Act are unambiguous. The Ninth Circuit's attempt to shift the analysis from whether the Mineral Leasing Act impliedly repealed the 1924 and 1927 taxing authorizations to whether the Mineral Leasing Act expressly incorporated the taxing provisions should be rejected because there exists no rule

[9] Arizona Bureau of Mines Bulletin No. 182, Table II, p. 27.

[10] This includes reservation Indians. Under 8 U.S.C. § 140(b) (1983), Indians are citizens of the United States. Consequently, Indians residing in the amici states are citizens of these states. U.S. Const. amend. XIV, § 1; *see, e.g., Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387 (1962) and *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948). As such, they are entitled to all the benefits of state law to which non-Indians are entitled. U.S. Const. amend. XIV, § 1.

or authority upon which to premise this alteration of the statutory analysis.

Congress, in enacting the original taxing authorizations, recognized the states' need to offset, through collection of state taxes, the substantial costs associated with severing activities occurring on Indian land. The original purpose behind permitting state taxation continues today because Montana and the amici states provide substantial services to tribes, tribal members, and non-Indian producers.

Finally, if this Court adopts the analysis used by the Ninth Circuit in deciding that Congress, by enacting the Mineral Leasing Act intended to repeal the earlier taxing authorizations, that holding should be applied only to the question presented, whether Montana can tax the royalties paid to the tribe; only the state tax on the royalty should be addressed and not state taxation of non-Indian producers.

Montana's taxes on the royalty share have been imposed pursuant to a currently valid and effective congressional authorization and are justified because of the services provided and should therefore be upheld.

POINT I

MONTANA'S TAXES ON OIL AND GAS OPERATIONS ON THE BLACKFEET RESERVATION ARE VALID BECAUSE CONGRESS SPECIFICALLY AUTHORIZED STATE TAXATION OF INDIAN ROYALTIES AND NON-INDIAN SEVERANCE OF OIL AND GAS FROM RESERVATION LAND.

The Blackfeet Tribe of Indians challenges Montana's authority to tax the tribe's royalty share received from severance of oil and gas from leased lands on the Blackfeet Indian Reservation. However, Montana's taxes are valid as a matter of law.

Congress expressly authorized Montana's taxes on royalties from mineral production from the Blackfeet Reservation in a provision of an act authorizing mineral leasing and taxation on unalloted Indian lands. Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. § 398 (1983) (hereinafter the 1924 Act). The 1924 Act provided that

> the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: . . . .

25 U.S.C. § 398. Congress reaffirmed this authorization for executive order lands in the Act of March 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. § 398a-e (1983) (hereinafter the 1927 Act).[11] Pursuant to the authorization contained in the 1924 Act, Montana has imposed severance taxes on tribal royalties derived from non-Indian production from reservation lands located in Montana. New Mexico's and Utah's taxes are imposed pursuant to the authorization enacted in 1927: Arizona and California derive authority to tax from both Acts.

A. Congress' intent to permit state taxation of mineral production from Indian lands is evident from the legislative history of the 1924 and the 1927 Acts.

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[11] The 1927 Act states in relevant part: "Taxes may be levied and collected by the state or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive Order Indian reservations in the same manner as such taxes are otherwise levied and collected and such taxes may be levied against the share obtained for the Indians. . . ." 25 U.S.C. § 398c.

The legislative history of the 1924 and 1927 Acts clearly evidences Congress' intention that states be permitted to tax royalties paid to the tribe from mineral severing activities occurring on Indian lands. During debate on the 1924 Act, the question whether states should be permitted to impose their taxes on both severance by non-Indian lessees from reservations and on the Indians' royalty share was examined and debated.[12] *See, e.g.,* 65 Cong. Rec. 6844 (1924). In a letter commenting on the taxing provision, Secretary of the Interior Work stated that "[t]his department realizes that the State should at least be permitted to tax the lessees' interest in any production of minerals on restricted unallotted Indian lands and will offer no objection to including a tax on the royalty belonging to the Indians. . . ." H.R. Rep. No. 386, 68th Cong. 1st Sess. 2 (1924). The final result of the Acts was that the "entire output of oil and gas will be taxed by the States, the producer paying upon his share and the Indians upon the share obtained for them." H.R. Rep. No. 1791, 69th Cong., 2d Sess. 4 (1927); *see also id.* H.R. Rep. No. 763, 69th Cong., 1st Sess. 5, 6 (1926).

There was general agreement expressed at hearings on the original bills which resulted in the final versions of the Acts that the states ought to benefit from the production of minerals on Indian land. The American Indian Defense Association endorsed the idea that the mineral output from Indian lands

12 Both the 1924 and 1927 Acts allow state taxation of the Indian's royalty share. Montana has asserted throughout this litigation that it does not impose its severance taxes on the royalties paid to the tribe. New Mexico and Utah voluntarily do not tax the royalties and Arizona, pursuant to authority from the Arizona Supreme Court, *Industrial Uranium Co. v. State Tax Commission,* 95 Ariz. 130, 387 P.2d 1013 (1963), imposes its taxes upon the royalty share. Whether the state severance taxes are imposed on the royalties is not relevant, however, because Congress has the authority to permit the states to tax the royalties and chose to do so in enacting the 1924 and 1927 Acts. *See also* Point III, below.

should yield a revenue to the states. *Hearings on S. 1722 and 3159 before a subcommittee of the Senate Committee on Indian Affairs,* 69th Cong., 1st Sess. 68 (1926). Moreover, taxation by the states was not seen as inimical to tribal benefit from the development of natural resources from their reservations because the tribes would continue to receive royalties from the leases. *See* 68 Cong. Rec. 4573 (1927) (remarks of Congressman Leavitt); 68 Cong. Rec. 4578 (1927) (remarks of Congressman Frear); *see also* H.R. Rep. No. 1791. As intended by Congress, the Acts of 1924 and 1927 clearly and unequivocally provided for state taxation.

More recently, Congress recognized the validity of state taxation of non-Indian severance from reservation lands. This continued recognition of the states' power to tax is demonstrated by recent legislative proposals to limit state severance taxes to a 12.5 percent rate. The limitation would have specifically applied to state severance taxes on energy resources "mined or produced on Indian lands. . . ." S. 2695, 96th Cong., 2d Sess. (1980); H.R. 6625, H.R. 6654 and H.R. 7163, 96th Cong., 2d Sess. (1980); S. 1778, 95th Cong., 2d Sess. (1979). Thus Congress' actions indicate a long-standing and continued recognition of state power to tax severance of minerals by non-Indian lessees from reservation land.

B. The taxing provisions of the 1924 and 1927 Acts have not been repealed.

The tribe argues that the explicit authorizations of state taxation in the 1924 and 1927 Acts have, in effect, been repealed by the Act of May 11, 1938, ch. 198, 52 Stat. 347, 25 U.S.C. § 396 (1983) (hereinafter the 1938 Act). The tribe asserts that tribal leases made after the effective date of the 1938 Act were made pursuant to the 1938 Act, and that prior leasing provisions have no applicability to these leases. If

adopted, this analysis would render the taxing provisions of the 1924 and 1927 Acts without effect. The practical result of this approach would be to find that these provisions had been repealed by the 1938 Act.[13]

The 1938 Act authorizes leasing of unallotted lands owned by a tribe, group or band of Indians. The underlying congressional purposes of the proposed legislation, which resulted in the policies stated in the Act itself, are disclosed in committee reports on preliminary versions of the Act that became law. One purpose was to obtain uniformity in the law relating to the leasing of tribal lands for mining purposes; the diversity in mineral leasing statutes had resulted in some lands not being subject to leasing for general mining purposes. While the oil and gas leasing provisions in the 1924 and 1927 Acts fulfilled the policies of encouraging tribal economic development and self sufficiency, the leasing provisions in other acts with regard to other minerals did not similarly accord with the intent of the Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (1976)) (hereinafter the I.R.A.). *See* H.R. Rep. No. 1872, 75th Cong., 3d Sess. 1 (1938); S. Rep. No. 985, 75th Cong., 1st Sess. 1 (1937); S. Rep. No. 614, 74th Cong., 1st Sess. 1 (1935); 79 Cong. Rec. 7815 (1935). A second purpose was to give Indians more income from their land by encouraging and facilitating mineral leasing; existing law created a hindrance to leasing lands for mining of some minerals in certain circumstances, thereby

[13] The impractical result of the Ninth Circuit's opinion is that a partial repeal by implication has occurred. Because the Ninth Circuit held that the 1924 Act governs leases entered into between 1924 and 1938, but not after, only a partial repeal has been effected in the Ninth Circuit's opinion. The *Blackfeet* dissent found it particularly inappropriate to conclude that the 1924 Act was still effective but then to give it no force. *Blackfeet Tribe of Indians v. State of Montana,* 729 F.2d 1192, 1204 (9th Cir.), *pet. for cert. granted,* 53 U.S.L.W. 3203 (Oct. 1, 1984).

depriving tribes of vast revenues. *Id.* A third purpose of the legislation was to give Indians a voice in granting all mineral leases, not just those for oil and gas. H.R. Rep. No. 1872 at 2; S. Rep. No. 985 at 2; S. Rep. No. 614 at 2; 79 Cong. Rec. 7815 (1935). The 1938 Act simply provided uniform procedures for leasing different types of Indian land while recognizing the tribes' right to enter into such leases; the 1938 Act did not in any manner concern, discuss or address the issue of taxation.

The taxing provisions of the 1924 and 1927 Acts may be given effect without conflicting with the general policies of the 1938 Act. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective," *Morton v. Mancari,* 417 U.S. 535, 551 (1974), "in the absence of some affirmative showing of an intention to repeal the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable," *id.* at 550, and "courts are not at liberty to pick and choose among congressional enactments" when two statutes are capable of co-existence, as are the statutes at issue here.[14] *Id.* at 551. There is no conflict between the leasing provisions of the 1938 Act and the taxing authorizations of the 1924 and 1927 Acts. Both the 1924 and 1927 Acts authorize state taxation of mineral production; the 1938 Act makes no reference to such taxation. Taxation of production does not affect the leasing procedures of the 1938 Act. Because the taxing provisions of the 1924 and

[14] Congress would be expected to have mentioned such a change in its outlook on state taxation of Indian minerals if it had intended to repeal the authorization of state taxation, *Watt v. Alaska,* 451 U.S. 259, 271 (1981); *United States v. United Continental Tuna Corp.,* 425 U.S. 164 (1976), particularly where Congress did not act to alter an agency interpretation of that statute. *See United States v. Rutherford,* 442 U.S. 544 (1979); *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367 (1969).

1927 Acts may be given effect without conflicting with the general policies of the 1938 Act there is no basis for an implied repeal.[15] *United States v. United Continental Tuna,* 425 U.S. 164 (1976); *Morton v. Mancari.*

Further the existence of Section 7 of the 1938 Act, which provides that all inconsistent acts or part of acts were repealed, "implies strongly that there may be acts on the same subject which are not thereby repealed," *Hess v. Reynolds,* 113 U.S. 73, 79 (1885), and "indicates plainly the intention of Congress to leave in force some portions of former acts relative to the same subject matter." *Henderson's Tobacco,* 78 U.S. (11 Wall.) 652, 656 (1870); *see also United States v. Greathouse,* 166 U.S. 601 (1897). Thus, that the 1938 Act was intended to be a general treatment of the leasing procedures does not establish an intention that the Act be a substitute for either the 1924 or 1927 Acts; rather, the language of Section 7 of the 1938 Act evidences the clear intention that repeal be limited to inconsistent acts alone.[16] Because the 1924 and 1927 taxing provisions are not inconsistent with the general leasing statute, there can be no implied repeal.

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[15] There can be no finding of congressional intent to effect a repeal of the taxation provisions of the earlier acts by implication because the legislative history of the 1938 Act is silent as to taxation. Congressional silence on the taxation issue in 1938 is significant because the taxing provisions of the 1924 and 1927 Acts were the subject of extensive debate. When Congress has focused on a subject in a specific statute, passage of a more general act does not indicate an intent to repeal. *See Radzanower v. Touche Ross & Co.,* 426 U.S. 148 (1976); *Morton v. Mancari; Ex Parte Crow Dog,* 109 U.S. 556 (1883).

[16] Further support that Congress recognized the continued existence of other acts is found in Section 4 of the 1938 Act which provides "[t]hat all operations under any oil, gas, or other mineral lease issued pursuant to this or *any other Act* affecting restricted Indian lands . . ." (emphasis added), are to be subject to rules and regulations of the Department of Interior.

There is no conflict between the 1924 and 1927 Acts which permit state taxation and the 1938 Act which does not address that issue. The two laws are complementary because they evidence Congress' intent to establish generally applicable mining standards in the 1938 Act and taxation powers in the 1924 and 1927 Acts.[17]

C. The Department of Interior's long-standing interpretation that the 1938 Act had no affect on the 1924 and 1927 taxing authorizations is entitled to deference.

After the taxing authorizations were enacted in 1924 and 1927, Montana and the amici states began imposing taxes on non-Indian severance from reservation land. *See, e.g., British-American Oil Producing Co. v. Board of Equalization of Montana,* 299 U.S. 159 (1936);[18] Laws of New Mexico, 1937, ch. 103, Sec. 1. Since enactment of the state severance taxes, the Department of Interior has been directly involved in the procedures by which the states have collected the taxes. *See, e.g.,* 58 Interior Dec. 535 (1943). As an accommodation to the producers, the Department of Interior authorized the producers

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[17] The Ninth Circuit gave weight to the fact that there remain in effect after the 1938 Act no other sections of the 1924 Act other than the taxing provision. 729 F.2d at 1201. Thus the circuit court more readily found that the 1938 Act had impliedly repealed the remaining taxing authorization of the 1924 Act. If this consideration is entitled to any weight, the 1927 Act does not suffer the same infirmity. The taxing provision is not alone in surviving enactment of the 1938 Act. *E.g.,* 25 U.S.C. § 398d (1976) (Changes in Boundaries of Executive order reservations). Further, the fact that there are other sections of the 1927 Act with continued validity demonstrates that the 1924 Act taxing provision does not stand alone in the wake of the 1938 Act.

[18] Montana's taxes have been imposed and their collection sanctioned by the Department of the Interior since the early 1920's. *See British-American,* 101 Mont. 293, 54 P.2d 129, 131, *aff'd,* 299 U.S. 159.

to reduce the tribal royalties by the amount of state taxes paid. *Id.* Likewise, between May 11, 1938, and November 7, 1977, the Department of the Interior repeatedly recognized the states' authority to tax the tribal royalty share of mineral production on Indian lands.[19] In 1977, however, the Department reversed the earlier opinions, holding that the 1924 Act no longer authorized taxation of the royalty by the states. 84 Interior Dec. 906, 911 (1977). In 1979, that conclusion was applied to the 1927 Act as well. 86 Interior Dec. 181 (1979).

The interpretation of the Department of Interior and its long-standing recognition of the validity of state taxation during the approximately 40 years between the time the 1924 and 1927 Acts were passed and the time the interpretation was changed is entitled to great weight in determining congressional intent. *Watt v. Alaska; United States v. Clark,* 454 U.S. 555, 566 (1982). "[T]he construction of a statute by those charged with its administration is entitled to substantial deference," *United States v. Rutherford,* 442 U.S. 544, 553 (1979); *see also Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976), particularly where, as here, the agency proposed the act which it then construed. *Watt v. Alaska,* 451 U.S. at 273; *Miller v. Youakim,* 440 U.S. 125, 144 (1979); *see* H.R. Rep. No. 1872, 75th Cong., 3rd Sess. 1 (1938). Whether the informal opinions of the Department of the Interior are to be accorded the same weight as formal opinions is irrelevant because it is undisputed that between 1938 and 1977 the Department of the Interior

[19] *See, e.g.,* Opinion of the Department of Interior, M-36246, "State Taxation of Tribal Royalty Interests in Oil and Gas Leases on Blackfeet Indian Reservation" (October 29, 1954); Opinion of the Department of Interior, M-36310, "Right of the State to Impose a Privilege and License Tax Against the Royalty Interest of the Indian Tribes of the Fort Peck Reservation, Montana" (October 13, 1955); Opinion of the Department of Interior, M-36345, "State Production Taxes on Tribal Royalties from Leases other than Oil and Gas" (May 4, 1956).

actively participated in implementing the statutes which permitted state taxation demonstrating the Department of Interior's committment to the correctness of its interpretation that state taxation was permitted. Thus it is this interpretation which is "more indicative of congressional intent." *Rice v. Rehner,* __U.S.__, 103 S.Ct. 3291 (1983) ("[T]he early interpretation by the Bureau of Indian Affairs . . . is consistent with the view of [the bill's sponsor, and] is surely more indicative of congressional intent . . . ." *Id.* (at 3301, n.13).

Recently, the Department of Interior, Board of Land Appeals, returned to the original administrative interpretation by not only recognizing Arizona's right to tax tribal royalties but requiring that the state tax reimbursement received by the non-Indian severer from its buyer be added to the taxable value of the mineral for purposes of both the royalty and tax calculations. *In re Peabody Coal,* 72 I.B.L.A. 337 (1983). The Board of Land Appeals tacitly recognized the states' right to tax by requiring the reimbursement of the state taxes to be included in the gross amount upon which the royalty share was calculated. The temporary alteration in the Department of Interior's position between 1977 and 1983 during which the department opined that state taxation was not allowed is an aberration which should be given no weight.

The 1924 and 1927 Acts expressly authorize state production taxes on Indian lands. These acts have not been repealed either expressly or by implication. Thus this Court should find Montana's taxes are valid and authorized as a matter of law.

D. Should they be applied, the rules of statutory construction applicable to Indian issues do not support a finding that the 1938 Act repealed by implication the 1924 or 1927 Acts.

The taxing authorizations contained in the 1924 and 1927 Acts are clear and unambiguous, a result reached by the Ninth

Circuit in analyzing the 1924 Act. *Blackfeet Tribe of Indians v. State of Montana*, 729 F.2d 1192, 1200 (9th Cir.) *pet. for cert. granted*, 53 U.S.L.W. 3203 (Oct. 1, 1984). But the Ninth Circuit then held, invoking assorted canons of statutory construction, that the 1938 Act superseded the explicit taxing authorizations. *Id.* at 1203. This conclusion was premised in part upon the Ninth Circuit's use of the I.R.A. to create an ambiguity in the otherwise clear 1924 and 1927 Acts which the court then resolved against the state on the basis of the canon of construction mandating liberal construction of ambiguities in favor of Indians. Such use of this canon of construction is unwarranted and unprecedented, as is employing the I.R.A. to create an ambiguity where none exists.

In the interpretation of statutes concerning Indians, where a statute is ambiguous, the ambiguity is to be resolved in favor of the Indians.[20] *Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980). This rule applies only where an ambiguity exists and is inappropriate where the statute is clear on its face:

> We give this rule [resolving ambiguities in favor of Indians] the broadest possible scope, but

[20] States may tax non-Indian activities which occur on trust land, *Thomas v. Gay*, 169 U.S. 264 (1898), *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), as long as the state tax is not imposed upon the tribe or one of its members and does not create a liability against tribal property. *Id.* Montana asserts that the legal incidence of its severance taxes is placed upon the non-Indian producer who extracts oil and gas from the Blackfeet Reservation. The amici states also impose a variety of severance and ad valorem taxes upon non-Indian extraction from reservation land. The legal incidence of these taxes also falls upon the non-Indian producer. *E.g.*, N.M. Stat. Ann. § 7-29-4 (1978). It is the non-Indian who is ultimately obligated to pay the tax and against whom the states will seek recourse if payment is not made. Because the legal obligation to pay these severance taxes is placed upon the non-Indian, the interpretation of the statutes at issue does not involve the interpretation of an Indian question.

> it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

Rice v. Rehner, 103 S.Ct. at 3302 (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975)). Because the taxing authorizations contained in the 1924 and 1927 Acts are explicit and unambiguous, there is no reason or justification for resorting to the rules of statutory construction: the language is clear and must be accorded its explicit meaning. *Id.*

The Ninth Circuit, in basing its opinion upon the policies underlying the I.R.A., sought to create an ambiguity in the otherwise unambiguous 1924 and 1927 Acts. Once having found the statutes ambiguous based on the policies underlying the I.R.A., the Ninth Circuit then used the Indian canon of statutory construction to transform the well-established rule that implied repeals are disfavored into a test of whether the 1938 Act expressly incorporated the earlier unambiguous taxing authorizations. There is no authority for changing the inquiry from the issue of implied repeal to that of express incorporation.

The I.R.A. represented a shift from the policies of assimilation embodied in the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388, 17 Cong. Rec. 1630-35 (1886), to a policy of Indian ownership and sovereignty. But the I.R.A. did not change the policy in the 1924 and 1927 Acts of encouraging Indian economic development and self-determination. Those Acts permitted longer and therefore more economically feasible mineral leases and required tribal approval of the leases. Nor did the I.R.A., in broadly and generally setting out Congress' change of emphasis in its relationship with Indian tribes, provide any basis for ignoring well-established rules of statutory construction. *Southern California Edison Co. v. Rice*, 685 F.2d

354 (9th Cir. 1982), *cert. denied*, __U.S.__, 103 S.Ct. 1497 (1983) ("Although United States policy toward Indians may have shifted away from an assimilationist approach in the years since the allotments were made, the fact that Congress has not amended or repealed [the act in question] shows that the position of Indian allottees . . . has not changed." 685 F.2d at 356 (citations and footnote omitted)); *accord Yellowfish v. City of Stillwater*, 691 F.2d 926 (10th Cir. 1982), *cert. denied*, __U.S. __, 103 S.Ct. 2087 (1983), and *Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians*, __U.S.__, 104 S.Ct. 2105 (1984).

The taxing authorizations in the 1924 and 1927 Acts permit state taxation of the royalties paid to the tribe on non-Indian severance from Indian land. The policies underlying the I.R.A. do not create any ambiguity in the earlier, unambiguous statutes and there is thus no justification for applying the rule of statutory construction. The inquiry properly focuses on whether the 1938 Act implicitly repealed the 1924 and 1927 Acts, which it did not, not whether, in interpreting the 1938 Act liberally in favor of the Indians, that Act must itself include a specific authorization of state taxation. *Blackfeet*, 729 F.2d at 1206 (Anderson, J., dissenting). Thus because the 1938 Act did not repeal the earlier taxing authorizations, Montana's taxes are valid.

POINT II

STATES SHOULD BE PERMITTED TO IMPOSE THEIR SEVERANCE TAXES ON PRODUCTION FROM RESERVATION LAND BECAUSE OF THE SERVICES THE STATES PROVIDE TO NON-INDIAN SEVERERS, TRIBES AND TRIBAL MEMBERS.

Montana and the amici states provide significant services to the non-Indian producers operating on reservations, to the tribes and to members of the tribes. These services are provided

even though Indian reservations encompass land which is separate from state land and subject to the separate sovereignty of the tribes. Services are paid for in part by receipts from severance tax collections.[21] While it is difficult if not impossible to determine specific dollar amounts of the services provided to tribes, individual Indians, or reservation residents, it is possible to identify some of the services provided by the states to all of their citizens, including reservation Indians.

In taxing non-Indian severance taking place on reservation land, the states are "assess[ing] taxes in return for governmental functions [they] perform[ ] for those on whom the taxes fall." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150 (1980). Thus the states have more than "a general desire to raise revenue"; the states provide services that "justif[y] the assertion of taxes imposed for on-reservation operations. . . ." *Id.*

Increased development of energy resources inevitably imposes significant costs on the states in which the development occurs, including both those directly resulting from the increased mining activities and those indirectly associated with increased development.

Mining activities directly affect state expenditures in many different areas. The environmental impacts of mining do not stop at reservation boundaries. Ground and surface water pollution, air pollution and solid waste disposal may all have substantial impacts on land outside the reservation even though the mining occurs within the reservation. These effects are direct results of the non-Indian mining activities. Each state has detailed systems for monitoring, controlling and regulating such environmental impacts. On-site inspections of mining

21 *See* Western Governor's Regional Energy Policy Office, Financial Strategies for Alleviation of Socioeconomic Impacts in Seven Western States, at p. 83 (1977).

operations, compliance with environmental standards and reclamation activities are costs which each state bears regardless of the location of the land upon which the activity takes place.

Energy development increases the need for construction of new state roads and maintenance of existing ones both on and off the reservation. Minerals extracted from the reservation do not remain there. They must be transported through the state in heavy trucks which damage roads. State roads are often required to open remote areas for new development and state funded roads provide the means for moving workers to mines and wells and mineral products to points of consumption.[22]

Energy development often generates whole new towns in formerly rural areas or new growth in existing towns and cities. The impact of new workers in rural areas dramatically increases the need for public and private facilities including schools, utilities, police and fire protection, recreation and health facilities, streets, sewers, and water systems, and requires substantially increased state funding.

States also bear the indirect costs of mineral extraction by establishing the regulatory framework for providing services to all of their citizens. Residents of the reservation and members of tribes are included as recipients of these services. State commissions regulate utility rates, protecting Indian and non-Indian consumers; insurance commissions regulate rates charged by insurance companies for Indian and non-Indian citizens; and

[22] This case should be distinguished from the situation presented in *White Mountain Apache Tribe v. Bracker*, where the roads which the state sought to maintain with the questioned tax were Bureau of Indian Affairs or tribally maintained. Although the state attempted to justify its tax as being dedicated to maintaining the same roads, this Court invalidated the tax because the state was "unable to identify any regulatory function or service performed . . . that would justify the assessment of taxes for activities on Bureau [of Indian Affairs] and tribal roads within the reservation." 448 U.S. at 148-149.

corporation commissions regulate corporate activity throughout the states. Other state agencies, such as the state attorney general's office, protect citizens from consumer abuse, unfair practices and anti-trust violations, the beneficial effects of which are enjoyed by all. Various licensing agencies for attorneys, doctors, dentists, chiropractors, veterinarians, barbers, architects, private investigators as well as many other licensed groups, regulate and protect Indians and non-Indians alike throughout the state.

Education expenses consume a large part of most state budgets. Although Indian tribes receive a substantial amount of federal money to establish and maintain their school systems, state and local governments assure adequate financial resources when federal tax dollars fail to meet the reservations' needs. *E.g., Prince v. Board of Education*, 88 N.M. 548, 543 P.2d 1176 (1975) ("Indian children are entitled to attend state public schools, even though Indian or federal schools might also be available in the same district." 543 P.2d at 1184); *Grant v. Michaels*, 94 Mont. 452, 23 P.2d 266 (1933). Additionally, state funded universities, colleges, junior colleges, branch colleges, and post-secondary trade schools are available at reduced tuition to all state residents.

States finance portions of low income benefits including welfare and food stamps. In these federal low income programs, states pay the costs of administering the programs and a certain percentage of the actual benefits to on and off reservation recipients. Many other social services are provided by various states to tribes and their members, including health planning and immunization programs, tuberculosis control, alcoholism and drug prevention and treatment programs. Also, in certain states, low income food, medical and energy tax rebates are available to all citizens regardless of payment of any income taxes. *See, e.g.*, N.M. Stat. Ann. §§ 7-2-14 and 7-2-14.1 (1978).

In many of these circumstances, Indian tribes receive substantial federal assistance, both monetary and otherwise, to operate the programs. But even where federal money is available, the states act to insure that minimum funding levels are met. For example, in education, if federal assistance is not adequate to reach a minimum funding level, the states contribute the money necessary to reach that minimum, whether the state money represents one percent of the total required or one hundred percent. This role as guarantor of adequate funding is becoming increasingly important in light of the substantial cuts in the federal budget for services to reservations, particularly in the areas of Indian health services and education programs. The states will be increasingly called upon to fill the gaps in the federal funding.

Each of these services is provided to Indians and non-Indians alike whether residing on or off reservation. Certainly energy related development increases the costs to the states. While the attendant increase in taxes derived from the economic activity may ultimately offset some of these increased costs, many of the benefits and services financed from state tax receipts are not quantifiable: there is no dollar for dollar relationship between tax dollars received from one individual and benefits paid by the state to that individual. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1941). One of the tenets of taxation is that the benefits of publicly funded projects will often accrue to persons and organizations who did not pay the costs. In energy rich states, areas of the state possessing the resources will pay a greater proportion to the state coffers for funding services provided to other areas which lack resources regardless of whether the tax generating activity or the use of the services occurs on or off reservation land. This is what taxation by a sovereign is intended to and does achieve. The states are providing through their systems of taxation the "only benefit to which [a taxpayer] is constitutionally entitled . . .[:] that derived from [ ] enjoyment of the privileges of living in an

organized society, estblished and safeguarded by devotion of taxes to public purposes." *Commonwealth Edison v. State of Montana*, 453 U.S. 609, 629 (1981) (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937)). The costs associated with the provision of benefits and services are indivisible: they are the instrument through which the quality of life is increased for society as a whole. The states use their receipts from tax collections to finance benefits to their citizens to improve their lives, and the states should be permitted to continue to collect their severance taxes to continue to provide the services to all.

POINT III

THE ONLY QUESTION PRESENTED IN THIS CASE IS THE VALIDITY OF STATE TAXATION OF INDIAN ROYALTIES: STATE TAXATION OF NON-INDIAN PRODUCTION IS NOT AT ISSUE AND PRESENTS A QUESTION SEPARATE FROM THE VALIDITY OF THE TAX ON TRIBAL ROYALTIES.

The 1924 and 1927 Acts authorize state taxation of both non-Indian severing activities and the royalties received by the tribes. Of the amici states, New Mexico and Utah do not impose their taxes on the royalty share; severance taxes paid to these states are calculated after the deduction of the tribal royalties.[23] Arizona, pursuant to the holding of its Supreme Court in *Industrial Uranium Co. v. State Tax Commission*, 95 Ariz. 130,

[23] New Mexico's statutes permit the state to tax the royalty "to the extent authorized or permitted by law." *E.g.*, N.M. Stat. Ann. § 7-29-4B (1978). New Mexico collected its taxes on the royalty share under the original administrative interpretations of the solicitor which recognized the states' authority to tax the royalties. However, when the solicitor reversed this long-standing administrative interpretation in 1977, New Mexico ceased calculation of its severance taxes prior to deduction of the royalty share.

387 P.2d 1013 (1963), has collected its taxes from the royalty share as well as from the non-Indian producers.

The issue presented in this case is a narrow one: can Montana, under the authority of the 1924 Act, impose its taxes on the Blackfeet Tribe's royalty share? The tribe, the state and the Ninth Circuit have each specifically limited the issue to the validity of taxes falling on the royalty share.[24]

Should this court uphold the Ninth Circuit decision, the amici states respectfully request that this Court address only that question and not address the validity of the remaining portions of the 1924 or 1927 Acts concerning the validity of state severance taxes imposed on non-Indian producers. Invalidation of the tax on the royalty share does not automatically invalidate the provisions allowing for state taxation of the non-Indian producers: the authorization of state royalty taxation is a wholly separate question from that of state taxation of non-indian production. State taxation of the tribe or its property is absolutely prohibited except when a congressional enactment permits the tax. State taxation of non-Indian activities, however, is not absolutely prohibited. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Thomas v. Gay*, 169 U.S. 264 (1898).

The Ninth Circuit held that the I.R.A. represented a shift in congressional Indian policy which was incorporated in the 1938 Act. 729 F.2d at 1194. The court then held that the general repealer in the 1938 Act demonstrated Congress' intent to repeal the earlier taxing authorizations which the court held

[24] The Ninth Circuit remanded this case for a determination of whether the state imposed its severance taxes on the tribal royalty. Implicit in this remand is the court's decision that state taxation of the royalties presents a different issue from state taxation of the non-Indian production. The amici states agree that these issues are different and should be treated differently.

were in conflict with the policies of the I.R.A. One of the purposes of the 1938 Act was to bring leasing procedures under that Act into harmony with the policies of the I.R.A. H.R. Rep. No. 1872 at 3. The general repealer clause, Section 7 of the 1938 Act, does apply to inconsistent acts or parts of acts. If, however, as the Ninth Circuit held, the I.R.A.'s policies apply the 1938 Act's general repealer to the 1924 Act, then only those provisions of the 1924 Act which are inconsistent with the I.R.A.'s policies are repealed. The only possibly inconsistent portion of the 1924 Act is that permitting state taxation of the royalty share.[25] State taxation of non-Indian severance in no manner affects, and certainly does not defeat, the goals of the I.R.A. If there is any adverse implication from state taxation it only occurs with regard to taxation of the tribal royalty share. Thus, only state taxation of the royalty share should be excised if this Court applies the analysis of the Ninth Circuit.

CONCLUSION

The amici states assert the continuing validity of the taxing authorizations contained in the 1924 and 1927 Acts. Whether states may tax the tribal royalty is a question separate from the validity of state taxation of non-Indian severance even though the 1924 and 1927 Acts authorize state taxation of both. Should this Court hold those authorizations inapplicable,

[25] The position of the amici states is that neither the tax on the non-Indian severance nor the tax on the royalty share conflicts with the 1938 Act. This position is discussed in detail in Points I and II above. Should this Court disagree, however, and uphold the Ninth Circuit's analysis which employs the I.R.A. policies to find an implied repeal, then the scope of that repeal should be limited to only the tax on the royalty share.

amici respectfully request that the holding be limited to the only question presented, that of the validity of the tax on the tribal royalty.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 1984, I, Paula Forney-Thompson, a member of the bar of the Supreme Court, caused to be mailed, postage prepaid, three copies of the foregoing Brief of the States of New Mexico, Arizona, Alaska, California, Idaho, Utah and Wyoming as Amici Curiae in Support of the State of Montana, to the following counsel of record:

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